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No. 00-69

Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

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JACKIE SANDERS

Petitioner,

v.

EXXON CORPORATION d/b/a
EXXON COMPANY, U.S.A.,

Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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# PETITIONER'S REPLY BRIEF

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## ARGUMENT

The Brief In Opposition sets out in great detail the exculpatory evidence and possible exculpatory inferences advanced by Respondent. The inculpatory evidence and inferences are described in the Petition. We do not ask this Court to evaluate this complex record under the standards announced in *Reeves v. Sanderson*, 120 S.Ct. 2097 (June 12, 2000); that is the responsibility of the court of appeals. Because, however, the Fifth Circuit decided this case prior to and without the guidance provided by this Court's decision in *Reeves*, this case should be remanded to afford the court of appeals an opportunity to apply the correct legal standard.

The factual disputes in this case are legion.

(1) Exxon claims that Sanders' transfer from her supervisory position in RAE to UFS was a lateral move and, therefore, not a demotion.[1] However, Exxon's documents demonstrate that the UFS position was a non-supervisory, entry-level job that had been previously filled by employees with lower classifications, shorter tenure, inferior qualifications, and lesser experience than Sanders[2];

(2) Exxon claims that Sanders "requested" the transfer to UFS.[3] Yet, Exxon concedes that Sanders "declined" to transfer to UFS in June, 1995[4]; and Shelia Templeton testified that Sanders was not "particularly happy"

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[1] *See* Brief. at 17.

[2] *See* R 1/915 (and related Exhibit 2); R 2/Exhibit I; R 2/Exhibit K; and R 1/857-858.

[3] *See* Brief. at 17 ("Petitioner had requested a transfer to UFS."); at 21 ("the transfer itself...was to a section she had previously requested..."). The fact is that Sanders had. at one time, expressed an interest in UFS but had told Schott as early as 1994 that she no longer desired to work in UFS. *See* R 4/353, Exhibit 1, at 131-133.

[4] *See* Brief. at 3, 19.

with being forced to transfer there in November, 1995[5];

(3) Exxon claims that Sanders' transfer from RAE supervisor to UFS could not have been a retaliatory demotion because Gary Schott played no role in the transfer and the "primary decisionmakers" were unaware of Sanders' opposition to Schott's alleged discrimination.[6] Yet, Exxon's own EEO investigative report states that Schott **"jointly"** decided to transfer Sanders to UFS; told his boss, Shelia Templeton, that "they needed to work the move" for Sanders; and that it was a "conscious effort"[7];

(4) Exxon claims that, even assuming Sanders' transfer constitutes a demotion, the transfer was motivated, not by retaliation, but by legitimate "business reasons": Sanders' "conflicts" with her subordinates; the "rotational" nature of Sanders' position; and the need to place a "high-performing" employee who was returning from family leave.[8] Yet, Schott conceded that Sanders' purported "conflicts" with her subordinates were "no different than what most supervisors go through."[9] Moreover, Exxon did not "rotate" Sanders' RAE counterpart, Darrell Call, who was the subject of a Title VII lawsuit against Exxon for sex and race discrimination and had been

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[5] *See* R 1/978, Exhibit N, at 109.

[6] *See* Brief, at 2 ("Schott offered her the job, but had no other involvement with the transfer."); and at 20 ("the primary decisionmakers...had no knowledge of her protected activity...").

[7] *See* R 1/847, 849-850 (emphasis added). In light of such clear documentary evidence, Shelia Templeton's testimony that she could recall no conversations with Schott concerning Sanders' transfer *See* R1/978, Exhibit N, at 107-108, is incredible and, thus, further underscores pretext.

[8] *See* Brief, at 3 n. 4.

[9] *See* R 1/1060-1061.

repeatedly cited by the company for being "inflexible and difficult to deal with..."[10]

(5) Exxon claims that it conducted a "full investigation" of Sanders' allegations concerning Schott's discrimination against the minority accountants.[11] Yet, it is undisputed that Exxon failed to interview any of the six minority accountants whom Sanders had identified as Schott's victims[12];

(6) Exxon claims that its "sympathetic" actions towards Sanders were the model of corporate "solicitude" and the "antithesis" of constructive discharge.[13] However, it is undisputed that, after Sanders opposed Schott's discrimination, Exxon relegated her to an entry-level job, substantially reduced her pay and, over its own nurse's directive,[14] repeatedly subjected her to "hard counseling"[15];

(7) Exxon claims that, in their September, 1996 conversation, its Controller, Bobby Alexander, did not attempt to coerce Sanders regarding her EEOC Charge and that, in any event, Alexander played no role in any of Exxon's allegedly retaliatory actions.[16] The September, 1996 conversation speaks for itself. As for Alexander's alleged non-decisionmaking role, Shelia Templeton testified that, in January, 1997

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[10] *See* R/1083 (Exhibit B and Exhibit C).

[11] *See* Brief, at 22.

[12] *See* R 2/Exhibit 0, at 39-43.

[13] *See* Brief, at 22.

[14] As evidence of its "solicitude" for Sanders, Exxon points to the fact that Sanders' supervisors consulted the medical department for "guidance" in dealing with her. *See* Brief, at 22. Yet, Exxon neglects to inform the Court that Exxon's nurse's (Liz Lawhorn) believed that management was "coming down hard" on Sanders and instructed it to "loosen up" on her. *See* R 1/978, Exhibit P, at 91-92.

[15] Under well-established case law, such conduct is the quintessential constructive discharge. *See*, e.g., *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

[16] *See* Brief, at 23.

Alexander not only vetoed his subordinates' recommendation to allow Sanders an unconditional transfer from UFS but directed them to subject Sanders to "hard counseling"[17];

(8) Exxon claims that Sanders was a "troubled" employee who required counseling for "performance issues."[18] Yet, Exxon did not begin documenting Sanders' alleged "errors" or subject her to counseling for "performance issues" until **after** she filed her EEOC Charge.[19] Over the preceding nineteen years, Exxon promoted Sanders five times and considered her one of its "highest potential" employees.[20] Moreover, Dan Jones—Sanders' immediate supervisor in UFS—testified that Sanders was a "hard worker," "knowledgeable," "eager to take no new challenges and responsibilities," and had significantly improved the efficiency of her UFS position;[21] and despite being Sanders' first-line supervisor, he did not participate in any of Exxon management's "hard counseling" sessions[22];

(9) Exxon claims that it made Sanders "seven" offers to transfer from UFS[23] and "earnestly" "begged" her not

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[17] R 1/854; R 1/978, Exhibit N, at 213, 215.

[18] *See* Brief, at 10.

[19] *See* R 1/978, Exhibit O, at 144-145. Exxon misrepresented to the Court that, in her Fifth Circuit brief, Sanders conceded that the company did not know about her EEOC Charge at the time its alleged retaliation commenced. *See* Brief, at 7 ("Petitioner admitted that all of this occurred prior to Exxon's first knowledge of Petitioner's EEOC charge on September 12, 1996."). Sanders' Fifth Circuit brief, at 15, states exactly the **contrary**—a point that Exxon's counsel has effectively acknowledged in a recent letter to Petitioner's counsel. Indeed, it is undisputed that Exxon learned about Sanders' EEOC Charge **before** it placed her on medical leave the first time.

[20] *See* R 1/921; R 1/978, Exhibit N, at 79.

[21] *See* R 1/978, Exhibit O, at 192-193.

[22] *See* R 1/978, Exhibit O, at 87.

[23] *See* Brief, at 8 n. 6.

to resign.[24] However, it is uncontroverted that Exxon presented Sanders with only one, conditional transfer offer: the "Catch-22" authorized by Bobby Alexander in January, 1997.[25] Exxon's request that Sanders not resign came months after the company demoted her, induced a nervous breakdown through "hard counseling," barred Sanders from the workplace, and placed her on medical leave for a second time.

(10) Exxon insinuates that Sanders' "emotional problems" were, in no way, connected to its hostile work environment.[26] However, prior to Exxon's demotion and harassment, Sanders had never required psychological or psychiatric treatment.[27] Additionally, Sanders' psychiatrist diagnosed her as suffering from depression connected with Exxon's alleged retaliation.[28]

## CONCLUSION

As the foregoing illustrates, the parties vigorously dispute numerous material facts in this case. Acting prior to *Reeves*, the District Court and the Fifth Circuit applied the very standards *Reeves* has now proscribed. That is, the lower courts not only failed to credit much of Sanders' evidence but weighed the evidence they did credit, construed all reasonable inferences from that evidence against Sanders, and then, relying in large part on Exxon's self-serving testimony, resolved the factual disputes in the company's favor. In the process, the lower courts applied the "pretext plus" standard rejected by *Reeves*. As a result, Petitioner now requests that the

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[24] *See* Brief, at 19, 23.
[25] *See* R 1/978, Exhibit N, at 207-217.
[26] *See* Brief, at 11, 18-19.
[27] *See* R 1/911.
[28] *See* R 1/948, Exhibit E.

Court grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in the light of *Reeves*.

Respectfully submitted,

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